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LAW AND RELIGION.

THE HON'BLE MR. JUSTICE S. VARADACHARIAR.

(*Continued from p. 62.*)

The period from the ninth or tenth century to the seventeenth or early eighteenth century may roughly be taken as the era of the appearance and growth of the *Nibandha* works. The different commentators who flourished in different parts of India reflected in their works the ideas and conditions prevailing in their respective parts of the country at or about the time that they lived and wrote. One must remember the history of the times in which they lived, when estimating their work or passing opinions about them. Otherwise, one is apt to be carried away by the criticism that "In Europe the thirteenth century marks the beginning of the ascending movement; in India it was the beginning of the dark ages." Even great empires like Vijianagar, despite their glory and splendour, did not achieve anything like a judicial system that could at all compare with modern ones. In many parts of India there was Moslem rule. So far as Hindu law was concerned, there does not appear to have been much of State administration of the Hindu law, though some of the well-known commentators seem to have been in some way associated with particular rulers. The administration of justice must, in all probability, have been the work mainly of panchayats. In such conditions, it was impossible to expect anything like an ordered development of legal administration or of systems of law and jurisprudence. It was therefore to the greater credit of the commentators that they did so much, in spite of adverse circumstances, to keep up a continuous attempt to adjust the law to changing conditions and to dissociate civil law as far as possible from religious observances. They did not and could not altogether turn away from the ideas deeply rooted in the

system. But, consistently with those ideas, they tried their best to develop a kind of jurisprudence which could stand comparison with any of the corresponding age in other countries.

So far as I have read and understood the Hindu law books, I have found no basis for the charge that the priestly classes stood to benefit by the changes that were made for ill or well in the Hindu law. I can understand the priestly class being interested in the *prayaschitta* and *achara kandas*. But I have never been able to understand the remark so frequently made by the people of the West, and repeated by others here also, that it was for the purpose of consolidating its influence and augmenting its emoluments that the priestly class subordinated the interests of the Hindu law to its own interests. I have, for instance, found it sometimes stated that the priestly classes encouraged partition, because after partition each of the divided coparceners has separately to perform the *Shradha* of his parents and this increased the gifts to the priestly classes. This seems to me, even if true, to amount to no more than the remark that one sometimes hears that lawyers are interested in the institution or multiplication of partition suits. It may be regrettable if this is so; but it has no bearing on the development of the law itself. It only helps the tendency latent in human nature to prefer the individual advantage of the coparcener to the corporate benefit of the joint family. After all, few of our critics seem to be enamoured of the joint family system and one wonders why they should blame the priestly classes for the breakdown of the joint family system. On the other hand, it has sometimes been pointed out, in explanation of the *Dayabhaga* system, that it was the exigencies of growing trade and business that led to the earlier disappearance of joint ownership of property in Bengal. In one place, Sir Henry Maine observes that by connecting the ownership of property with the performance of funeral rites, Hindu jurists became more and more reluctant to place property in the hands of women; but when he came to deal with the texts recognising the rights of inheritance of women and heirs descended through women, he would not give credit to the authors for more liberal ideas but would prefer to attribute these texts to the desire of sacerdotal lawyers to multiply the number of persons from whom they could receive presents by extending to them the privilege of offering sacrifices or *pindas*. Against such prejudice, there is, of course, no arguing.

One service that the author of the *Mitakshara* rendered to the Hindu law was to dissociate religious considerations from civil law as far as possible. This is clear from his definition of *Daya* and from his scheme of inheritance. By a long disquisition at the commencement of the chapter on partition, Vignaneswara seeks to establish that the conception of property is of secular origin, though property may have its use in the performance of religious rites and sacrifices. He defines *Daya* as wealth which becomes the property of another *solely* by reason of relation to another. With this may be compared the definition given by Jimutavahana, according to whom *Daya* is wealth in which property dependent on relation to the former owner arises *on the demise of that owner.* The latter definition better accords with modern ideas of inheritance; but the author of the *Mitakshara* did not treat *Daya* as identical with "inheritance", because in the case of inheritance, properly so called, the propositus will ordinarily be the full owner—this is the Bengal theory—whereas, according to the *Mitakshara,* the ownership of the propositus has in some cases to be qualified by the recognition of the son's right by birth even during the father's life time. Death of the propositus is not, according to Vignaneswara, the *origin* of the successor's right, but only the removal of an obstacle (*pratibandha*) in his way. Hence his classification of *Daya* into *apratibandha* and *sapratibandha* (unobstructed and obstructed). What is important in the present connection is that by thus dissociating death from the definition of *Daya,* and ascribing *Daya* to relationship, he was able to carry the principle of secularisation further, so that when he came to the law of inheritance he could wholly base it on the doctrine of consanguinity as distinguished from the theory of spiritual benefit. The *Smritis* had enumerated the heirs specifically only up to the end of what is known as the "compact series", that is, up to the brother's sons. Beyond this followed the two groups of *Gotraja* and *Bandhu,* and in fixing the order of succession amongst heirs falling within these groups, Vignaneswara has given full scope to his doctrine of "consanguinity". There can be little doubt that "consanguinity", as the basis of the right to inheritance, is more in accordance with modern ideas than the theory of spiritual benefit.

Even in the *Dayabhaga,* there was some attempt to dissociate religion from civil law; Jimutavahana's doctrine of

"Factum Valet" is of special significance in this connection. Even where he brought in arguments based on religious efficacy, he seems to have done so not out of a desire to make Hindu law more archaic but with a view to advance it and liberalise it, with the aid of the accepted religious notions. In this way, he succeeded in making the father absolute owner even of property inherited by him from his father, in making brothers tenants in common of property inherited from their father and in improving the chances of succession of women and of *Bandhus*, bringing in some *Bandhus* even before *Gotraja Sapindas*.

The one charge that has to be made against the author of the *Dayabhaga* is in respect of the nature of the estate which he accorded to women in his scheme of inheritance. In this matter the *Dayabhaga* and the *Mitakshara* differ. Vignaneswara was prepared to treat property inherited by a woman as her *Stridhana*, but Jimutavahana was not prepared to do so and insisted on the "reverter" of the estate to the heirs of the last male owner, treating the woman's succession as a mere interposition. It is unfortunate that the Privy Council preferred Jimutavahana's views to those of the author of the *Mitakshara* in this matter, even so far as some of the areas governed by the Mitakshara are concerned. If the trend of development appearing in the *Mitakshara* and the other works following it had been allowed to grow in the ordinary course, there is no reason to think that Hindu law would not have reached a plane of development comparable, if not superior, to modern legal systems. Take, for instance, what is now known as the Bombay school. The author of the Mayukha found no difficulty in reconciling the Hindu law texts with more liberal views as to the rights of women. (*See also* the work of *Balambhatta*). In Bombay, scholars are now attempting to compile a work known as the *Dharma Kosa*, arranging therein under various heads, all relevant extracts from the earliest *Smritis* and even from the Vedas to the latest commentaries—a bird's eye-view of Hindu law as it were under given headings. This work, when completed, would help to give one a clear idea of the evolution of Hindu law from time to time. It is the absence of facilities for a study of that kind that has led to a great deal of misconception about the Hindu law.

The prevalent misconception about the attitude of the Hindu law towards women compels me to make more than a

passing reference to that topic. About fifty years ago, Sir Gurudas Banerji observed (in his Tagore Law Lectures):

> "Nowhere are proprietary rights of women recognised so early as in India and in very few ancient systems of law have these rights been so largely conceded as in our own."

Strangely enough, it was about the same time that Sir Henry Maine spoke of the excessive harshness of the Hindu law to the personal and proprietary liberty of women and he referred to the sustained effort on the part of the Brahminical writers on mixed law and religion to limit the privileges of women which they seem to have found recognised by older authorities. In another connection, Maine stated that the Hindu law as to *Stridhana* has undergone progressive deterioration. Even in our days, it is not uncommon to hear it said that women have been treated as chattels under the Hindu law. A familiar couplet पिता रक्षति कौमारे भर्ता रक्षति यौवने । पुत्रश्च स्थाविरे भावे न स्त्री स्वातन्त्र्यमर्हति ॥ (the father protects her when she is young, the husband when she has grown up and the son when she has become old. Women do not deserve to be independent) has frequently been relied on as justifying much of the above criticism. It is not in my province this evening to discuss the problem of the social, economic or cultural position of women in Hindu society. I am concerned only with the legal aspect of the question. But to those who lay undue emphasis on the above *shloka* I must point out that it should be understood as part of a system which by its Upanishads taught the student to treat his mother as divine [मातृ देवो भव]. Even the much maligned Manu has laid down that women must be honoured, that where they are not honoured no sacred rite yields rewards, that where the female relations live in grief, the family soon perishes and that men who seek welfare should honour women. (Manu—Buhler's Translation III, 55 to 59.) For the moment, I propose to restrict myself to the significance of the term *Swatantrya*, as it is of importance not merely in dealing with the social aspect above referred to but also in the legal aspect, and as I am of opinion that the omission to appreciate the distinction between *Swamya* (ownership) and *Swatantraya* (dominion or power of independent disposition) is responsible for much of the misapprehension about the attitude of the Hindu law towards women. The modern conception of ownership includes, besides the notion of proprietary right, the

elements of (1) the right to transmit the property to the heirs of the owner and (2) the power of unlimited disposition. The Hindu law conception of ownership was different; according to it, *Swamya* did not always imply *Swatantrya*. Not merely was this distinction kept up in the case of women, but it was equally important in the *Mitakshara* scheme as to the rights of the father in a Hindu joint family. By a system of checks and balances, Vignaneswara postulated the equal ownership of the sons in the ancestral property of the father, but recognised limited powers of disposition over the joint property only in the father. None of the joint owners had, according to him, an unlimited power of disposition; it is indeed doubtful if he at all contemplated a transfer of the undivided share by any coparcener. It is remarkable that even in the case of the self-acquired property of the father, the sons had, according to the *Mitakshara*, a kind of ownership during the father's lifetime and though the sons could not interdict a disposition of the same by the father, the latter was nevertheless directed not to dispose even of his self-acquired immovable property unnecessarily or to the prejudice of his sons. It is in the light of this peculiarity of the Hindu law conception as to ownership, especially of immovable property, that the Hindu law relating to the rights of women should be appraised.

It will be convenient to consider the subject under four heads: (1) woman's power to acquire or own property; (2) her power to inherit property; (3) her power to transmit it to her own heirs; and (4) her power to dispose of property. Whatever might have been the position in the pre-*Smriti* days, even the earliest *Smritis* deal with *Stridhana* as a well-known category, thus recognising the woman's right to acquire or own property. Even as regards her right to inherit, I am not aware of any *Smriti* which in terms excludes a woman from succession on the ground of her sex. On the other hand, the earliest texts recognise in specific terms the right of inheritance of at least some women, namely, the widow, the daughter and the mother. As regards the heritability of a woman's property, the law relating to *Stridhana* clearly recognised that a woman might be a fresh stock of descent but notwithstanding the elaborate description of the several kinds of *Stridhana*, the earliest *Smritis* did not expressly deal with the succession to property inherited by a woman. They did not in terms state

the later doctrine of "limited estate" or "reverter". It must also be remembered in this connection that even in the case of *Stridhana*, the property devolved (except in the case of unapproved marriages) on the husband's heirs in default of certain descendants of the woman, whether male or female. It is thus nothing strange that the early *Smritis* did not attach the same importance as the commentators did to the question whether in respect of property inherited by a woman, she was herself to be treated as a stock of descent or not. As I have already observed, the author of the *Mitakshara* and some other writers who followed him were prepared to treat her as a stock of descent even in respect of property inherited by her. But it is the *Dayabhaga* school that insisted on the theory of "limited estate" and the doctrine of "reverter". As pointed out by Mr. Golap Chandra Sarkar, there was even apart from the doctrine of the inferiority of the spiritual benefit conferred by a woman, justification for Jimutavahana insisting on the theory of reverter. According to his system, a widow or daughter inherited her husband's or father's share even in joint family property, because he did not recognise the theory of survivorship. It was, therefore, natural for the other members of the family to feel that in default of certain kinds of issue, the share in joint family property thus inherited by the widow or daughter should not pass out of their family. It will thus be seen that so far as these three heads are concerned, there is little justification for the criticism that the Hindu law has been opposed to the rights of women. When we come to their powers of disposition, the distinction already pointed out between *Swamya* and *Swatantrya* is of special importance; and it must be borne in mind that even in respect of *Stridhana* property, the Hindu law texts did not give an unrestricted power of disposition to a woman.

A further source of misconception has been to regard the Hindu law respecting the rights of *widows* as typical of the Hindu law relating to women. The decisions of the Judicial Committee are to some extent responsible for this view; but this is not consistent with the true spirit of the Hindu law. Its provisions relating to the *widow* were to some extent coloured by the Hindu view as to the kind of ascetic life that a widow was expected to lead; it was unfair to generalise therefrom as regards the position of all Hindu women. The misconception

above referred to was in some early decisions carried so far as to hold that a gift to any Hindu woman, even if it be, for instance, to a daughter or mother or sister, would *prima facie* convey only a limited estate; and it was only later recognised that there was no justification for any such presumption except in the case of gifts to a widow. It is a curious feature of legal history that while the Hindu law imposed disabilities on the widow, the law of mediæval Europe and even of modern Europe till comparatively recent times imposed disabilities on married women during coverture. Sir Henry Maine recognised that Christianity introduced a reaction against the liberalism of the later Roman law as to the personal and proprietary independence of women. How different the position was in India may be seen from the fact that not merely in the law books but even in the Mimamsa works, there is a distinct recognition of the equality of ownership of both husband and wife in the property of the *husband*. It is on this ground that in sacrifices it was insisted that both husband and wife should join, as otherwise the *Swatwa Nivritti* (that is, the extinction of the donor's ownership) in the sacrificial offering will not be complete. The legal position is thus stated in the *Smriti-chandrika*:

> "It must be understood that in a husband's property the wife by reason of her marriage always possesses ownership though not of an independent character, but that the husband does not possess even such ownership in his wife's property." (Chapter IX, S. 2, pl. 14.)

Lower down, the author observes (in pl. 16) that:

> "Sons and the like possess no ownership whatever over the *Stridhana* of their mother. Hence it is settled that there is no partition of *Stridhana* during the lifetime of the woman."

I do not forget that a few Sanskrit writers have attempted to restrict the rights of women within narrow limits and even sought to exclude them as covered by the term *Nirindriya* in the text of exclusion. But I see no justification for treating them as representing the Hindu law in preference to a writer like Vignaneswara and his successors.

Before an audience of lawyers I do not propose to expatiate on the present state of the Hindu law. The result of a century's administration of the Hindu law by the British Indian Courts has been such that if to-day one of the *Smriti Kartas* should come back to life, he would hardly recognise in the present Hindu law anything like what he gave to Hindu society. What

is now administered as Hindu law in this country is neither the law of the *Smritis* and the *Nibandhas* nor one wholly based on principles of reason, utility or equity. In *Mohori Bibi's case*[1], the Judicial Committee recognised that there could be no equity in favour of a person dealing with one who had no power to borrow or sell. But it is the application of some principle of equity in favour of mortgagees and purchasers that has made the Hindu law relating to joint families anomalous and illogical. We have, further, one rule of law for voluntary alienations and another rule for involuntary alienations, in the *Mitakshara* as administered in Bengal and in the United Provinces. We have interesting problems as to whether the transferee from a coparcener acquires a *jus in rem* or a *jus in personam*, whether the interest transferred becomes fixed or is variable with deaths and births in the family and whether the transferring coparcener ceases to be a coparcener or not. The introduction into law of the theory of "pious obligations" is another source of confusion; and we have had conflicting and indeed irreconcilable pronouncements as to antecedent debts, trade debts and so on. The humorous part of the situation arising out of the enforcement of the son's pious obligation to pay his father's debt is that even when the son has no objection to the father going to Hell and the father is quite ready to go there rather than pay his debt, it is the creditor who has to pretend to be anxious about the father's salvation and accordingly ask the Court to enforce payment of the debt out of the property of the joint family. These illustrations will suffice to show the truth of the criticism of Sir James Stephen that judicial legislation in India has much more of the drawbacks of that kind of law than similar growth elsewhere, because it is in the long run legislation by foreigners who are under the thraldom of precedents and analogies belonging to a foreign law.

That the scheme of inheritance under the Hindu law requires radical changes to bring it into line with modern needs and ideas is scarcely likely to be disputed, though there may be differences of opinion as to the changes to be introduced. The rationalistic principle of inheritance is that the law of intestate succession should, as far as possible, correspond to the probable sentiments of the propositus as to the objects of his bounty and the expectations that may be reasonably entertained by

1, (1903) L.R. 30 I.A. 114: I.L.R. 30 Cal. 539 (P.C.).

How could she be expected to have sympathy for a step-daughter or towards other near relations of the husband in preference to her parents and brothers? But can it be said that the step-daughter and other near relations of the husband had no reasonable claim on the bounty of the deceased? My objection is not to a liberal treatment of the widow, but to the attempt to achieve this object by tinkering with one bit of the law.

In existing circumstances, piecemeal legislation may be unavoidable, during the transition stage; but the proposed legislation should be conceived as part of a logical and comprehensive scheme to be introduced in due course. If people are anxious to make the Hindu law of inheritance logical and perfect, they must put aside the theory of the "nearer excluding the more remote" among the heirs and go in for a scheme of *distribution* of the property of the deceased among different groups of heirs, as under the English Statute of distributions or the Indian Succession Act. I decline to believe that any Hindu would prefer to give away all his property to his widow and leave his mother, father, daughter and other near relations to starve. Inheritance may be limited to a narrow circle of near relatives. Escheat in default of such relatives would be quite in accordance with the views of advanced thinkers like Bentham, Mill and Sedgwick and would give definite advantage to the public exchequer. Hard cases oughtnot to make bad law, whether in the administration of justice or in legislation. After all, the idea of *distribution* is not unknown to the *Dharma Sastras*, for at one stage of the development of the Hindu law, partition consisted of a "distribution" of the estate of the father between sons, daughters and the mother.

Marriage is another question in regard to which liberal changes are being attempted. According to the Hindu conception, marriage is a *samskara* or a sacrament and is intimately connected with the religious rites to be performed by the spouses in their later life. I can understand liberal changes being made in regard to civil marriages and I see no objection to people being allowed freer recourse to civil marriage laws. But those who wish to conform to the sacramental form of marriage should not go in for radical departures from the prescribed rules. The Hindu law books have dealt with marriage

under the head of *Achara* and not as part of *Vyavahara*. It has been observed by a Western writer that:

"Instinct marriage, emotion marriage and intellect marriage has each its dangers and the problem is how to work out a synthesis of the three component parts."

The traditional ideal associated with the hallowed names of Sita and Savitri seem to me too sacred to be lightly disturbed—at least before society has definitely decided what ideals are to be substituted in its place. It seems scarcely fair that in respect of an institution of such vital importance, the method of "trial and error" should be advocated.

So far as adoption is concerned, it is necessary that the spiritual aspect of it should be dissociated from its civil aspect. There is no reason why the law of adoption should not be made more logical and all the quibbling about "divesting" be put an end to. The decisions of the Judicial Committee in *Bhoobun Moyee's case*[1] and *Padma Kumari's case*[2] relating to the termination of the widow's power to adopt and the invalidity of an adoption after such supposed termination are not consistent with Hindu ideas and are frequently departed from in practice.

Before concluding this discourse I deem it my duty to notice an argument that one frequently hears in these days. It has been sometimes said that the ideals of Hinduism are unprogressive, individualistic and anti-social. The implication is that any system of law suitable to a progressive society, which must be based on the recognition of the need for active social service, as distinguished from the pursuit of individual salvation, must of necessity part company with Hindu religion. I venture to think that this proceeds on a misapprehension of the true principles of Hinduism. I do not here propose to enter into a discussion of the merits or demerits of particular social or religious institutions. Taking the highest ideals prescribed by Hinduism, I assert with some confidence that it is difficult to conceive of a system which has more successfully combined the pursuit of temporal and spiritual ends. At particular stages, and for particular classes of people, our sacred literature might have laid more stress on individual salvation (*Nivritti Marga*), or, as it has been described by Western thinkers, the principle of "world and life negation". But, as observed by Schwietzer,

1. (1865) 10 M.I.A. 279.
2. (1881) L.R. 8 I.A. 229: I.L.R. 8 Cal. 302 (P.C.).

the conflict in the history of Indian thought between the principle of "world and life negation" and the principle of "world and life affirmation" has been decided by the former ever making greater concessions to the latter. On the other hand, whatever emphasis we may sometimes choose to lay on temporal ends, it is neither possible nor desirable to ignore spiritual ends, understanding the expression "spiritual ends" in its most comprehensive sense. As Dean Inge said:

> "If man is not entirely willing to give up this world for the next, he is at heart equally unwilling to give up the next world for this."

The ideal of service is not foreign to Hinduism. The very conception of *Grihasthasrama* is that it should be one of service to fellowmen. It may be that modern notions of service are somewhat different and the demands of society may vary from those that obtained in the past in Hindu society. But to say that the idea of service is unknown or foreign to Hinduism is absolutely untenable. Two statements familiar to most Hindus may usefully be referred to here: one which says परोपकारार्थमिदं शरीरं (this body has been given to us only for service to others), and the other which makes service to fellowmen a part of religion: परोपकारपुण्याय पापाय परपीडनम् ॥. As Sir Radhakrishnan once observed, civilisation in this country has been a sustained effort to embody the highest philosophical truths in social life.

JOTTINGS AND CUTTINGS.

The Masters in Bad Odour.—In the eighteenth century it was the pernicious custom for the Chancellors to sell the offices attached to their court for large sums. According to Foss, Lord Harcourt received £250 for the appointment of Clerk of the Custodies and sums of £700 and £800 from two of the Masters, while Lord Cowper, although he had abolished the objectionable custom of New Year's gifts, received a substantial sum for granting the place of Master. Having to pay such sums for their appointment, these appointees and their colleagues, who were much in the same case, sought to recoup themselves by speculating with the suitors' money of which they had charge. This practice seems to have been in vogue for a considerable time, indeed till 1720, when one of the Masters having absconded in consequence of the failure of his banker, in whose hands he had deposited a large amount of the suitors' cash, the revelations which then came out led to the impeachment of the Lord Chancellor, Lord Macclesfield, for corrup-

tion by selling offices contrary to law and for taking extortionate sums for them with the knowledge that the payment was defrayed out of the suitors' money. As a result of the trial he was found guilty and fined £30,000, and thus suffered for a lax system which had been in vogue for some time, but to which he had bowed by increasing the purchase price of the office of Master in Chancery. —*L.T., 1939, p. 15.*

Rules of Evidence.—A point as to the admissibility in evidence of a statement given before justices by a witness who had since died, as recorded by the clerk to the justices, which was argued before, but not decided by, Lord Justice Finlay sitting as an additional judge of the King's Bench Division last week, is a fresh reminder of the slow emancipation of our evidential rules which have come down to us from the distant past. It is almost unthinkable that it was only in the second half of the nineteenth century that the evidence of the parties to an action were made competent witnesses, and probably many lay readers of the account of the trial of "*Bardell* v. *Pickwick*" regarded it as a mere travesty of a lawsuit, seeing that neither the plaintiff, Mrs. Bardell, nor the defendant, Mr. Pickwick, was called as a witness; but Dickens knew at least this much of the rules of evidence, that at the date of the trial the parties to an action were not competent witnesses. Since those days there has been a somewhat slow improvement of the law as to the admissibility of evidence, the most notable, of course, being that effected by the Criminal Evidence Act, 1898, which enabled an accused person to testify on his own behalf if he so desired.—*S.J., 1939, p. 101.*

Law Reporting.—The Lord Chancellor's attention has been called to the great number of law reports and to the fact that they appear to be increasing, thus causing difficulty to members of both branches of the profession and others. He has accordingly appointed a committee to consider the matter and to advise him upon it. The members of the committee will be: Mr. Justice Simonds (chairman), Mr. Justice Wrottesley, Professor A. L. Goodhart, Mr. L. S. Holmes, Mr. Trevor Hunter, K. C., Mr. C. Le Quesne, K. C., Mr. N. L. C. Macaskie, K. C., Mr. R. F. Roxburgh, K. C., Mr. J. H. Stamp, Professor P. H. Winfield, and Mr. J. F. Woodthorpe.—*L.T., 1939, p. 96.*